

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO. 547 OF 2012**

**ESTHER**

**BAMBANZA:.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK (U)**

**LTD:.....DEFENDANT**

**BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO**

**JUDGMENT**

**1. BACK GROUND:**

The Plaintiff on the 29<sup>th</sup> day of April 2011, purchased land comprised in Kibuga Block 28 plot 509 land at Makerere measuring 0.50 an acre (the suit property) at the price of Uganda Shillings Two Hundred Million Only (Ug. Shs. 200,000,000/=) from the Defendant. Under Clauses 3(iii) and 4(i) of the Sale of Land Agreement, the Defendant undertook to deliver vacant possession of the land upon the Plaintiff completing payment of the purchase price.

The Plaintiff completed payment on the 31<sup>st</sup> day of May 2011 but the Defendant did not deliver the promised possession of the suit property hence this suit seeking in which the Plaintiff seeks orders for;

- (a) Payment of UGX. 299,300,000 (Uganda Shillings Two Hundred Ninety Nine Million Three Hundred Thousand only),
- (b) *Mense profits* from July 1, 2011,
- (c) General damages,
- (d) Interest at Commercial rate on (a) and (b) from the date or receipt of the money until payment in full

- (e) Interest on (c) at Court rate from the date of judgment until payment in full
- (f) Costs of the suit, and any
- (g) Other relief deemed necessary and sufficient by court.

During the prosecution of the suit and on the 2<sup>nd</sup> day of June 2014, the parties before this Honourable Court entered into consent agreement which was filed in this Honourable Court on the 12<sup>th</sup> day of June, 2014 upon the terms below listed;

- a. That the Defendant would refund to the Plaintiff the purchase price of Uganda Shillings Two Hundred Million Only (Ug. Shs. 200,000,000/=) for the suit land,
- b. That the Defendant would pay the Plaintiff interest on purchase price an amount of Uganda Shillings One Hundred Nineteen Million Five Hundred Fifty Six Thousand One Hundred Sixty Four only (Ug. Shs.119,556,164/=),
- c. That the Defendant would refund Uganda Shillings Fifteen Million only (Ug. Shs.15, 000,000/=) being recovery fees paid to M/s Muganwa, Nanteza & Co. Advocates by the Plaintiff,

- d. That the Defendant was to pay Interest on (c) above amounting to Uganda Shillings Eight Million Hundred Twenty Thousand only (Ug. Shs. 8,820,000/=)
- e. That the Plaintiff was to hand over title deed of the aforementioned land to Defendant with duly executed transfer forms upon receipt of the payment stated in (a) to (c) above, and
- f. The unsettled reliefs regarding general damages, *mesne profits* and costs would be decided by this Honorable Court.

The above mentioned consent agreement thus did therefore narrow down the issues which had originally been set for determination to those c indicated below.

## **2. ISSUES**

- (a) Whether the Plaintiff is entitled to general damages and interest thereon,
- (b) Whether the Plaintiff is entitled to mesne profits, and
- (c) Whether the Plaintiff is entitled to costs of the suit.

### **3. Whether the plaintiff is entitled to General damages and interest thereon**

The Plaintiff claimed for general damages as against the Defendant on the basis that since she did meet the originally agreed terms of the agreement made between herself and the Defendant and it was the Defendant who failed to honour its side of the agreement when it failed to give her vacant possession of the suit land, then a case for general damages had been made by her. On the other hand, the Defendant dismissed this contention and submitted that Plaintiff was not entitled to general damages as she was at all times informed of the process which was delaying the handing over to her of the suit land and that indeed when the Defendant was able and ready give her vacant possession to her vacant possession, the Plaintiff instead opted to be refunded the purchase price which was eventually refunded together with other costs and interests which should have resolved the matter.

However, the plaintiff, insisted that certain issues needed to be tried in order that she is compensated for the action or inaction of the Defendant and hence the claim for damages and other matters herein.

It is trite that general damages are awarded by courts whenever there is breach of a legal duty by a party who owes to another a prescribed legal duty. The decision in the case of **William Alfred Kitembo Gunn & Anor versus Rwakaikara Ivan HCCA No.7 of 2013**, is one where this the general principle was expounded to the effect that while general damages for breach of contracts are compensatory for loss suffered and inconvenience caused to an aggrieved party in order for aggrieved party to be put back in the same position as he/she would have been had the contract been performed, such putting back an aggrieved person ought not to be to the effect of making that person be in a better position than was supposed to be. The *ratio decidendi* therefore for general damages is the fault principle.

This principle was also followed by the High Court (Commercial Division), in the case of **Dada Cycles Ltd**

**versus Sofitra S.P.R.L Ltd: High Court Civil Suit  
No.656 of 2005.**

Where the learned trial judge went at length to point out that if a Plaintiff suffers grave disappointment as a result of the non performance of a duty by a Defendant, then such a Plaintiff was entitled to general damages with the same court further going to state that it was not possible to measure loss suffered in general damages in a similar way as to loss one would suffer due to personal injury since in the former case one would have look into the future in order to forecast what would have happened had the aggrieved party never entered into a contract as court would find it problematic to forecast it as there was no certainty in contrast with the position in the latter where the situation was much more clearer resulting in the court only making rough estimate in assessing the loss of a Plaintiff.

Relating this scenario to the instant matter, it would appear to me that whereas the parties herein agree that indeed there was an agreement for sale of land between the Plaintiff and the Defendant on the 29th April 2011 with some clauses

in the said agreement providing for the Defendant to give vacant possession of the said land to the Plaintiff, the same said agreement provided also that the Defendant irrevocably undertook to refund the purchase price to the Plaintiff in the event the Defendant failed to give vacant possession of the suit land to the Plaintiff. This is the clear provision of Paragraph 3(iii) of the said agreement tendered in evidence as Annexure A.

Indeed the agreed facts on record show that on conclusion of the sale of the property, the Defendant failed to hand to the Plaintiff vacant possession and eventually decided to refund the purchase price of the suit property. But offers a defence of not being able to do so due to the fact the failure of a third party, the police force, which failed to clear bailiff company authorised by it to hand over the property in time. The Plaintiff views this failure by the Defendant to hand over the said property at the time when she completed payments of the purchase price and even thereafter not refunding the purchase price in time as a breach of the Defendant's contract obligations.



From the evidence on record, my observation is that the Defendant does admit that it gave the Plaintiff never obtained vacant possession of the land in question but avers that it had no obligation to deliver the vacant possession to the Plaintiff. This is its position when the testimonies of its witnesses Semakula Charles Muganwa (DW1), Angelina Namakula Ofwono (DW2) and Nicholas Muhwezi (DW3) are analysed.

On the other hand , the Plaintiff's evidence based on the testimonies of the Plaintiff Esther Bambaza (PW1) and Jengo Arnold (PW2) shows that while according to the contract it did not matter whose duty it was to deliver vacant possession , the contracts provisions were clear and unequivocal on the issue of what would happen in event of failure by the purchaser to obtain vacant possession of the land and that was that the vender had to refund the purchase price of the object in question ase the sale agreement had a fixed the point at which vacant possession was to had and that this was paragraph 4(i) of the agreement which stipulated that the purchaser would take

up possession of the land upon the payment of purchase price balance which occurrence happened on the 31<sup>st</sup> day of May, 2011.

My take on this matter since the Plaintiff completed payment of purchase price within the time frame stipulated in the agreement but it did not obtain vacant possession of the suit land, then it ought to have been refunded the purchase price.

What therefore begs question would be as when the said purchase price supposed to be refunded?

It appears from evidence that upon the Defendant failing to give vacant possession to the Plaintiff, the parties before me entered into negotiations for the refund of the purchase price to the Plaintiff and eventually a consent agreement was made to that effect to the Plaintiff this was too late too little as it only happened when this suit was about to be concluded and since it was the fault of the Defendant that the transaction collapsed, the Plaintiff had by then not only suffering emotional distress but had got as a result of the failure of the conclusion of the contract health complications

in addition to her failing to enjoy quiet possession of the said property, making her financial loss, got disappointed and was inconvenienced.

On the basis of this , the Plaintiff argued that she was entitled to be awarded as against the Defendant of general damages and attendant interest at Court rate from the date of judgment till payment can be seen from paragraph 11(c) & (e) of her plaint.

My perusal of the plaint shows that the claim of the Plaintiff is based on the Defendant's failure to give vacant possession to the Plaintiff inspite of several reminders. **(Paragraph 7 of the plaint)**

The Defendant argues that while it was willing and ready to give vacant possession and even refund the purchase price, it was in fact never given the opportunity to refund the purchase price prior to the commencement of the suit. It emphasized that through the evidence of its witnesses during trial that had the Plaintiff sought for a refund of the purchase price before the suit she would have received it. Additionally, the Defendant added that the plaintiff's case

was premised on the Defendant's alleged failure to give vacant possession of the suit land and not on the issue of a failure to irrevocably refund the purchase price which the plaintiff was then raising in submission yet this was not a matter in issue at the trial, since the purchased price was settled interparty during the course of the trial before the Defendant led its evidence. That at the hearing of the Defendant's evidence, the Plaintiff's claim was for general damages on the Defendant's failure to give vacant possession of the suit land to the Plaintiff and on issues of good title.

The defendant therefore submits that the Plaintiff in her submissions had substantially departed from the issue at the trial and the substance of the evidence adduced by the plaintiff in support of its claims in the suit which is not only is illegal and does not stand in law and equity.

That even if that was not the case, the defendant avers that it did not ever breach on its warranty to irrevocably refund the purchase price upon the failure of the plaintiff taking vacant possession of the suit land so as to warrant an award

of general damages since eventually by the consent executed by the parties the defendant indeed paid the plaintiff a total sum of Ugx **343,375,164/-** refund of the purchase price broken down as follows;

- |                               |                    |
|-------------------------------|--------------------|
| 1) Purchase price             | Ugx. 200,000,000/= |
| 2) Interest on purchase price | Ugx. 119556,164/=  |
| 3) Recovery fees              | Ugx 15,000,000/=   |
| 4) Interest on Recovery fees  | Ugx. 8,820,000/=   |

And so the claim for general damages on the basis that the defendant was in breach of failing to irrevocably refund the purchase price, even after the defendant had made the refund substantially above the purchase price would be extremely unreasonable, unjust and harsh on the defendant in the circumstances.

It's a well established legal position that claims for general damages under an agreement arise where there has been a breach of a condition (term) in an agreement. Thus, upon the breach of a legal duty in an agreement. In the words of Hon. Justice Yorokamu Bamwine (as he then was) in the case

of **Ronald Kasibante versus Shell Uganda Ltd. (2008)**  
**HCB 162** - “the breach of a contractual obligation confers a right of action for damages on the injured party”. SEE: **Dada Cycles versus Sofitra Ltd. H.C.C.S No. 656/2005 at page 5.**

Damages Defined;

The **Black’s Law Dictionary**, 8<sup>th</sup> Edtn, at page 416, defines **damages** as “Money claimed by, or ordered to be paid to, a person as compensation for a wrong.” Further at page 417 **“General damages”** are defined as **“Damages that the law presumes to follow from the type of wrong complained of”**

Accordingly, it’s imperative, that in order for the prevailing issue to be well resolved, it has to be first established, **whether the defendant breached a legal duty** “bestowed upon in the Land sale Agreement” concluded with the plaintiff.

Breach of Legal Duty;

Honourable Justice Bamwine (as he then was) stated in the case of **Ronald Kasibante versus Shell Uganda Limited**

**(2008) Hcb 162** that **breach of a contract is the breaking of an obligation imposes**, which confers a right of action for damages on the injured party – SEE; **Dada Cycles versus Sofitra Ltd H.C.C.S No. 656/2005.**

The plaintiff is stated to have commenced this suit against the defendant to recover monies expended by her during the purchase of the suit land comprised in Kibuga Block 28 plot 509 situate at Makerere, as well as other remedies as was contained in the plaint. Following the execution of consent interparty the plaintiff was promptly paid respective sums of money as agreed, **plus interest.**

One of the claims left was a claim for general damages. As earlier on espoused, such a claim arises from, and hinges on proof of a breach of a term in a contract.

*“...the irrevocable undertaking to refund the purchase price to*

For the defendant to have been in breach of irrecoverably refunding the purchase price (albeit, at the time this suit was taken out) it would be imperative to first conclusively address the following issues;

(a) *The time at which there was a failure to take vacant possession;*

(b) *The time within the purchase price was to be refunded after the failure in (a)*

(c) *Whether the plaintiff ever demanded a refund of the purchase price from the defendant, and was unsuccessful.*

In submission to the foregoing;

(a) *The time at which there was a failure to take vacant possession;*

During the trial of the suit, the issue of vacant possession of the suit land dominated the suit and it was extensively contended upon by both parties. The outstanding facet of this issue was “Whether the defendant was mandated or undertook under the agreement to issue vacant possession of the suit land to the plaintiff.”

Under **paragraph 6** (last paragraph) on **page 4** of its submissions, the plaintiff states that;

“According to the contract, it did not matter whose duty it was to deliver vacant possession to the plaintiff...”



Under paragraph 5 of the submissions, on page 4, the plaintiff states that;

“... the defendant unnecessarily attempts to show it had no obligation to deliver vacant possession.”

In the case of **Magezi & Another versus Ruparelia [2005]2 Ea 156** the Supreme Court stated that

**“...the intention of the parties to an agreement is to be determined from the words used in the agreement...”**

Consequently, **paragraph 4(i)** of the sale agreement provided that;

4(i) - The purchaser shall take up possession of the land upon the payment of the... balance (on the purchase price)

**Paragraph 3(iii)**

“The vendor.... irrevocably undertakes to refund the purchase price.... In the event of a failure by the purchaser to take up and / or acquire vacant possession of the land”

From the foregoing clauses in the agreement it was an express term that the duty to obtain vacant possession was at all material times bestowed upon the purchase of the suit

land. The defendant did not ever guarantee to issue vacant possession of the land and the taking of possession was never to be at the auspice, assistance or involvement of the defendant. The land was sold on an "As is" basis. The plaintiff purchased the same "As is", knowing its physical status.

Before we take leave of this point, it appears to me that the failure of the plaintiff to obtain vacant possession was never occasioned by the direct acts of the defendant and or defects of its title in the suit property.

The defendant's right to sell here arose by law under the Mortgage Act, 2009. The defendant's good title to the land (as mortgage) therefore was created by statute. Further, goodness of title in the circumstances did not extend to being in physical possession of the land and or any representation that the defendant would give vacant possession.

This was no defect in the title of a mortgage though there was a delay in the obtaining of vacant possession because . the title of the defendant in the suit property was never

challenged by any party and the orders restraining vacant possession were eventually vacated by court which consequently ordered vacant possession.

Therefore a contract voluntarily entered into by the parties like the contract in question is enforceable against the parties as it is.

At the trial, and in her submissions, the plaintiff failed to rebut the fact that the defendant did not ever guarantee issuance of vacant possession and it's thus irrefutable that the duty to take vacant possession was upon her. The minimal involvement of the defendant in seeing to it that the plaintiff obtained vacant possession was without prejudice, in fair business practice and in accordance with the defendant's business values.

.The Plaintiff appears o have kept on pursuing vacant possession as evidenced from her last correspondence to the defendant (Annexure D2 to the plaint).

It is very clear that a refund would accrue in the event of a failure to take possession, which, according to the evidence on record did occur . I find that the contract itself did not lay down a time frame within which the said refund would have to be made upon the failure to take possession. The contract just stated “upon failure to take possession”.

the case of **Kabona Brothers Agencies versus Uganda Metal Products & Enameling Co. Ltd. (1981 -82) HCB 74** where court relied on the case of **Hadley versus Baxendale (1843 -1860) All E.R.461**, it was laid down as fundamental principle that;-

*“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the*

*breach of it. “ SEE; Dada Cycles v Sofitra Ltd*  
**H.C.C.S No. 656/2005 at page 3.**

Premised on the above arguments , it is thus cannot be said that the defendant breached the contract terms on refunding the purchase price as to warrant an award of general damages. The refund of the purchase price which was done when the suit had taken off with substantial interest, under the circumstances aforementioned, in my view rests the Contrary of which would be extremely harsh on the defendant.

the defendant did not willfully keep the plaintiff from her money for all the reasons mentioned above. In fact, when it became clearly certain any this suit that the plaintiff wanted a refund of her purchase price, **the plaintiff refunded the money, plus substantial interest** as above stated. Under the sale agreement, there was no agreement as to a refund with interest, but the defendant did so. In circumstances my Lord an award of interest would be harsh.

This issue resolves the whole matter and so I will not delve into discussing the issue of Mesne profits arise from probable rental value of the premises.

And as to as whether the plaintiff is entitled to costs of the suit. It is trite that costs follow the event even before judgment is delivered, the events favour the plaintiff as her claims to refund of purchase price, and special damages and interest have been substantially settled by the defendant. It is therefore only reasonable that the costs of the suit be awarded to Plaintiff this is on the basis of the fact that Section 27 of the **Civil Procedure Act** bestows upon Court the discretion to grant costs. Like all discretion which I exercise on the basis taking into account all relevant circumstances since in the defendant refunding the purchase price plus interest, it ought to have also considered the costs of this suit as part of the settlement.

### **Order**

In conclusion I partially find that the plaintiff would be eligible for the award of the costs of this suit taking into

account that there was adequate settlement of the issues before me.

This suit therefore succeeds only in respect of the costs. I do so order accordingly.

**Henry Peter Adonyo**

**Judge**

**26<sup>th</sup> September ,2014**